No. 11,347

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LERNER STORES CORPORATION (a corporation), *Appellant,*
vs.
WILFRED A. LERNER, *Appellee.*

BRIEF FOR APPELLEE.

MARCEL E. CERF, ROBINSON & LELAND,
1060 Mills Tower, San Francisco 4, California,
Attorneys for Appellee.

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BRIEF FOR APPELLEE.

I. APPELLANT'S SPECIFICATION OF ERRORS PRESENTS NO REVIEWABLE QUESTION.

It is apparent from appellant's specification of errors that this appeal is in fact an attempt to reargue the entire case in the expectation of inducing this Court to come to a different conclusion, upon the entire record. This is revealed by the indefinite and generalized nature of the specification of errors, and by the comments of appellant upon those specifications.

Under the heading "Specification of Errors" appellant states:

> "Appellant's position is that:
>
> (1) The trial Court erred in refusing to make any finding on certain material points as to which the evidence was uncontradicted;

(2) Many of the findings made by the trial Court are not supported by the evidence;

(3) Under the uncontradicted evidence the Court erred in refusing to grant any relief to appellant in connection with the use by appellee of the name 'Lerner'." (App. Br., pp. 2-3.)

(a) Appellant's specification (1).

The first specification, that "the trial court erred in refusing to make any finding on certain material points as to which the evidence was uncontradicted", fails to point out what the so-called "material points" are, so that it may be ascertained by an examination of the findings whether findings were in fact not made upon such "points", and if not, whether they are "material".

Similarly, the specification fails to indicate the "uncontradicted evidence" relied upon to support the "material points", so that it may be ascertained whether there was such evidence, and whether it was, in fact, uncontradicted.

(b) Appellant's specification (2).

The second specification, that "many of the findings made by the trial court are not supported by the evidence", is a mere generality. There is no indication as to which of the "many" findings are not supported by the evidence, or how many such findings there are, so that it may be ascertained whether the other findings which *are* supported by the evidence, and to which no objection is taken, are sufficient to sustain the judgment; and if not, whether the findings

which it is asserted are not supported by the evidence are not, in actual fact, supported by the evidence. Obviously, in the absence of identification of the particular findings, or portions of findings, which are asserted to be unsupported, it is impossible to divine what particular questions are presented for review. The objection here made does not preclude the possibility that there are material findings sufficient to support the judgment to which no objection is taken upon the ground of insufficiency of the evidence. Hence, even if the objection be true, it presents no ground for reversal.

(c) Appellant's specification (3).

The third specification merely states, in effect, that the entire evidence in the case was uncontradicted and that appellant was entitled to judgment, as a matter of law, upon such evidence. There is no attempt to state, in even the most general terms, the evidence relied upon, or even the subject matter thereof, or the principle involved, so that it may be ascertained whether the evidence is in fact uncontradicted, and if so, whether it supports the conclusion that appellant was entitled to judgment, as a matter of law.

The most that can be said for the foregoing objections is that they merely raise the question whether the findings of fact support the judgment. The rule has been frequently applied and is beyond dispute.

> "The assignment of errors alleges error because the court found certain facts, because of certain declarations of law, and in failing to render a judgment for the plaintiff. These assign-

ments present no reviewable question, except the question whether the judgment is supported by the findings which were made."

Dreyer Commission Co. v. Hellmich (CCA 8th) 25 F(2) 408, 410.

"Assignment 3 is: 'That the evidence was, and is insufficient to justify or support the verdict of the jury and/or the judgment.' This is not a proper or sufficient assignment of error, nor is it separately or specifically urged in appellant's brief and therefore should not be considered."

Mutual Life Ins. Co. v. Wells Fargo Bank & Union Trust Co. (CCA 9th) 86 F(2) 585, 587.

"Assignment No. 22 is 'that the judgment is contrary to law in that it is not justified by any evidence nor is it supported by findings of fact.' This assignment is not only too general, but it embraces three different assignments of error contrary to our rule 11. The alleged errors embraced in this assignment are as follows: First, 'that the judgment is contrary to law. * * *' This cannot be considered because too general. Washburn v. Douthit (C.C.A.) 73 F. (2d) 23. Second, 'that it is not justified by any evidence * * *.' This assignment is also too general and is not based upon any ruling of the court pointed out in the specification. Hecht v. Alfaro (C.C.A.) 10 F. (2d) 464. Third, 'nor is it supported by findings of fact.' This latter assignment, if entirely separate from the other two, would be a proper assignment to challenge the sufficiency of the findings of fact to support the judgment. Assignment 22 need not

be considered because it violates the rule requiring assignments of error to 'set out separately and particularly each error asserted and intended to be urged.' "

Century Indemnity Co. v. Nelson (CCA 8th) 90 F.(2) 644, 647.

"The three remaining specifications of error assert that 'The evidence is insufficient to justify any verdict herein'; that 'The verdict is contra to [sic] the instructions of the court and against the law'; and that 'The court erred in permitting the judgment in favor of the plaintiff and against the defendant'."

"In the light of the record, which we have already discussed, these assignments are entirely too general to bring up any question for review of this court."

Humphreys Gold Corporation v. Lewis (CCA 9th) 90 F.(2) 896, 898-9.

See:

11 Cyc. of Fed. Proc. (2d Ed.) pp. 715, 723-728;
12 Cyc. of Fed. Proc. (2d Ed.) pp. 14-19;
4 *C. J. S.* pp. 1717, 1784, 1883.

The indefiniteness of appellant's specification of errors is not the result of inadvertence or lack of skill. It is intentional, as indicated by the following remarks, immediately following the specification of errors:

"In presenting this appeal appellant has in mind the governing rule that the trial Court's appraisal of the evidence will not be set aside unless

> it is clearly erroneous. This appeal is predicated upon the proposition that *a review of the evidence in detail* and consideration of the record *as an entirety* leads to the conclusion that material portions of the findings of the trial Court are not supported by evidence, [and] that the lower Court failed to give proper legal effect to the facts set forth in the record." (App. Br., p. 3.) (Italics added.)

Appellant neglects to explain how "a review of the evidence in detail and consideration of the record as an entirety" can reveal that "material portions of the findings * * * are not supported by the evidence", in the absence of specific identification of the findings which are said to be material, and unsupported.

Similarly, appellant does not disclose how "a review of the evidence in detail" will show in what respects the Court "failed to give proper legal effect to the facts set forth in the record" in the absence of specification of the particular facts to which the Court failed to give the desired "legal effect", and a statement of the "legal effect" which appellant would have substituted for the conclusions reached by the trial court. Appellant does not even explain what is meant by the phrase "legal effect" as used here. Does it mean that the court made improper legal conclusions from the facts found? Does it mean that the findings are contrary to the evidence? Unsupported by any evidence? Against the weight of the evidence? Or just merely contrary to *appellant's view* of the evidence?

Obviously, appellant is attempting to object because the trial court's view of the evidence was not the same as appellant's. This is further borne out by appellant's remarks at the conclusion of the "Statement of the Evidence" (which statement is not conceded to be correct) as follows:

> "Evidently it was the view of the trial Court, as evidenced by statements from the bench (Tr. 294-297), that while appellant had built up a valuable and expanding business and a substantial good will, it had no store actually located in San Jose, and there was no likelihood of confusion or unfair competition as between appellee's store in San Jose and appellant's stores in San Francisco and Oakland. The Court directed that findings and judgment should be prepared denying appellant any relief." (App. Br., p. 19.)

This is precisely the principle issue before the trial court. On its face it reveals that appellant is well aware that the court was passing on questions of fact which are peculiarly within the province of the trial court, namely, whether, under the evidence, there was likelihood of confusion, or unfair competition, between appellant's stores in San Francisco and Oakland, and appellee's store in San Jose, where appellant had no store. At the hearing upon the settlement of the findings, appellant's counsel admitted that the basic question whether there was competition between the appellant's business in San Francisco and appellee's business in Oakland was for the trier of fact. Counsel stated.

> "* * * a certain amount of business or a certain number of customers per month came from these various areas. There is not any dispute about that. *Whether it is sufficiently material to move the court is another question.*" (Tr. pp. 300-301.)

Naturally, if there was a conflict of evidence upon any material issue necessary to support appellant's case, the findings of the trial court on that issue against apellant are fatal to this appeal. Similarly, on questions as to which the testimony is uncontradicted, but from which different inferences may be drawn, or to which the trial court is authorized to give varying weight, a finding against appellant on a material issue is fatal to this appeal.

But, as already pointed out appellant has not favored this court or appellee with a specification of the findings which are objected to, upon one ground or another. It is respectfully submitted that, upon the authorities cited the judgment should be affirmed, without proceeding beyond this point.

> "A violation of our rule * * * justifies the court in refusing to consider the specifications which violate the rule."
>
> *Century Indemnity Co. v. Nelson* (CCA 9th) 90 F(2) 644, 648.

> "Appellee challenges the assignment of errors as insufficient for the matters appellant seeks to present here. Obviously, this question must be resolved before we proceed further, since we must determine which, if any, of the matters urged by appellant are not properly before us.
>
> * * * * * * *

Appellant designates assignments 7, 8, and 9 as presenting her contention that the evidence failed to sustain plaintiff's allegations of fraud and that the misrepresented facts contributed to the death of insured. Assignment 7 is: 'Under the greater weight of all the credible evidence in the case there should have been a finding and decree in favor of the defendant' Assignment 8 is: 'The decree is against the law and against the law under all the evidence.' Assignment 9 is: 'The Court erred in its special findings of fact numbered one to eight, inclusive, as filed March 28, 1934.' These assignments are each too general to present a defined issue of law here. As to assignment 7: There were two separate and distinct matters presented by the pleadings (fraudulent representations in the application and ill health at delivery of the policy), either of which, if true, would justify rescission of the policy. The trial court found both true. Even if the fraudulent representations in the application were unsupported by the evidence, yet the ill health at delivery of the policy would remain and be sufficient to sustain the decree. Assignment 8 is obviously too general. Assignment 9 is a blanket attack upon all of the findings of fact which included various distinct matters—some of which are attacked here and some not.

Appellant relies upon assignments 3 and 11 to support her presentation of the issue that the appellee is not entitled to equitable relief because it tendered rescission during the contestable period and therefore has an adequate remedy at law. Assignment 3 is: 'The Court erred in its conclusions of law filed and entered March 28,

1934.' Assignment 11 is: 'The Court erred in decreeing a cancellation and rescission of the policy in issue.' Clearly, each of these assignments is too general.

Conclusion

Since none of the assignments of errors here relied on is particular enough to present any matter which we may examine, we are precluded from discussing the merits of the various propositions urged by appellant. It is an easy matter for parties to clearly and particularly state, in the assignment of errors, the precise issue of law they seek to present here. Our rules require that the assignment 'shall set out separately and particularly each error asserted and intended to be urged.' Clearly, no one of the above assignments, complies with this simple and easily followed requirement.''

Rohrback v. Mutual Life Ins. Co. of New York (CCA 8th) 82 F(2) 291, 292-3.

''Assignment 3 is: 'That the evidence was and is insufficient to justify or support the verdict of the jury and/or the judgment.' This is not a proper or sufficient assignment of error, nor is it separately or specifically urged in appellant's brief and therefore should not be considered.''

Mutual Life Ins. Co. v. Wells Fargo Bank (CCA 9th) 86 F(2) 585, 587.

However, without intending to waive the objection to the inadequate specification of errors, appellee will proceed and point out that the findings support the judgment, and that the points discussed in appellant's argument are without merit.

II. APPELLANT'S STATEMENT OF THE EVIDENCE IS NOT CORRECT.

Before giving attention to appellant's argument, appellee takes issue with appellant's "Statement of the Evidence", and particularly to the statement at the outset thereof that "the record show the following uncontradicted *facts*". (App. Br., p. 3) (Italics added.) The statement of evidence is replete with appellant's own conclusions and inferences, and are neither facts nor evidence. For example, it is stated that it is an uncontradicted fact, that

> "It has been the policy and practice of appellant to continually expand its organization and open new stores.
> * * * * * * *
> The practice is for new stores to be opened first in populous cities, followed by stores in surrounding communities after a nucleus of business from the surrounding communities has been built up." (App. Br., p. 7.)

It is true that there was some testimony to this effect offered by appellant, but it did not stand up under cross-examination and it was not supported by the evidence of the actual practice pursued by appellant.

This so-called "practice" is discussed in various places in appellant's argument, and appellee will point out the inaccuracies in the above statement in the portion of this brief dealing with that subject.

Similarly, other inaccuracies in the "Statement of the Evidence" will be pointed out in responding to

appellant's arguments wherein the particular evidence is discussed. To do so here would merely entail repetition.

III. THE FINDINGS SUPPORT THE JUDGMENT.

The findings in the case at bar are in the usual form found in cases of this kind and were adapted from forms which have received judicial approval.

In the case at bar, the trial court made findings, in considerable detail, that appellant had twelve stores in California, of which only the stores in Oakland and Stockton, and the two stores in San Francisco, were in Northern California. (Finding II, Tr. p. 31); that appellant's stores were located in "100% locations" [see Tr. p. 118 for definition] and relied in substantial part upon passing pedestrian traffic for their customers; that appellant's stores did not advertise in newspapers, periodicals, or in any other manner than in the use of the name on the store fronts, and on wrapping paper, bags and price tags, that is to say, only upon or in the stores; that the customers of appellant's stores consisted in substantial part of passing pedestrians, who in turn consisted principally of people from within the city and the immediate environs where the respective stores were located, but including persons from throughout the United States and other places,—or as appellant states, appellant's stores in the various cities are patronized "where such persons happen to be" (App. Br., p. 23, Finding III, Tr. pp. 31-32); that appellee opened his

store in San Jose in good faith and without knowledge that appellant had any intention of opening a store there, that he took reasonable precautions to prevent confusion between his business and the stores of appellant; that no confusion has resulted, and that there has been no detriment or damage to appellant by reason of any act or conduct of appellee; (Findings IV and V, Tr. p. 31-32) that appellee's store, signs and advertising are of such character, appearance, and form that no reasonably observant or careful person would be confused or do business with appellee under the misapprehension that he was doing business with appellant; that appellee had not done any act, or made any statement, or resorted to any artifice that would mislead or confuse customers, and that none were confused or misled, and that appellee had performed no unfair act, or made any unfair statement, or resorted to any unfair practice detrimental to appellant. (Finding VI, Tr. pp. 33-34.)

The foregoing findings are directly responsive to, and the negation of, the allegations of the complaint to the contrary effect. (See par. 7-15, of the complaint, Tr. pp. 6-11.) The complaint alleged, in substance, that appellee, with fraudulent intent, opened a store in San Jose and conducted his business in such manner as to confuse and deceive the public, to the detriment and damage of appellant. The foregoing findings completely dispose of the issue thus tendered by the allegations of the complaint and the denial thereof in the answer. (Tr. pp. 18-27.) If the findings were to the opposite effect, in favor of

appellant, they would support a judgment in favor of appellant, and conversely they amply support a judgment in favor of appellee.

The foregoing findings were adopted from the findings in a similar case, which were there held to be sufficient.

The Ida May Co., Inc. v. Ida May Ensign, 20 Cal. App. (2d) 339, 341-3.

See, also,

Pohl v. Anderson, 13 Cal. App. (2d) 241, 242.

But the findings do not stop with finding, in effect, that the allegations of fraudulent intent, confusion, deception and damage are untrue, although such findings, and no others, would have sufficed. The answer expressly pleaded that

> "Plaintiff has not advertised and has not engaged in business in a locality where defendant's store is located * * *." (Tr. p. 24.)

and that defendant was

> "using his own name in the operation of his business and is so using it in a geographical location in which plaintiff has no store and has no substantial business * * *." (Tr. p. 27.)

In response to the foregoing defense, the court made finding VII, as follows:

> "Said 'Lerner Shops' have not been advertised in and about the City of San Jose, and neither plaintiff nor any of its subsidiaries have engaged in the retail ladies ready-to-wear business in San Jose under the name of 'Lerner Shops' or under

any other name, or under any name including the word 'Lerner'. Defendant was first in the field in and about the City of San Jose in the retail ladies ready-to-wear business under a name including the word 'Lerner'. The business of defendant is in a separate and distinct geographical and trading area and in a separate business community from any of said 'Lerner Shops.' Neither plaintiff nor any of its subsidiaries, nor any of the 'Lerner Shops' has or had entered into the retail ladies ready-to-wear field in and about the City of San Jose prior to the time when defendant commenced to do business therein, as aforesaid. Defendant has not done and is not doing business in any field, territory, area or market previously entered or occupied by 'Lerner Shops', or any of them, or by plaintiff or any of its subsidiaries, or in which any of said 'Lerner Shops' or plaintiff or any of its subsidiaries were doing business prior to the time when defendant commenced to do business as aforesaid. The business conducted by defendant in San Jose is not in competition with the business of said 'Lerner Shops' or any of them, or with the business of plaintiff or any of its subsidiaries." (Tr. pp. 35-36.)

This latter finding in the instant case is based upon and adapted from the findings in *Griesedieck Western Brewery Co. v. Peoples Brewing Co.* (CCA 8th) 149 F(2) 1019, 1021-22. Although that case involved a trade mark used in the marketing of beer, the question involved was the rights of the plaintiff to enjoin the defendant from using the name "Stag" in the marketing of beer in a territory in which the court found,

from the evidence, the plaintiff had not previously sold its product. In approving the findings, the court said:

> "The findings of the court are presumptively correct and should not be set aside nor disturbed unless clearly erroneous. Rule 52, Rules of Civil Procedure, 28 U.S.C.A. following section 723c; Esso, Inc., v. Standard Oil Co., 8 Cir., 98 F. 2d 1. A study of the record discloses that there was little or no conflict in the evidence. So far as these findings reflect primary facts as distinguished from interferences or conclusions, we think they are sustained by abundant evidence."
>
> *Griesedieck Western Brewery Co. v. Peoples Brewing Co.,* Supra, at p. 1022.

Among the findings thus approved were the following:

> "(6) that plaintiff and defendant are not now and never have been in competition with each other and that plaintiff has never advertised nor sold any of its 'Stag' beer in any market where defendant has advertised or sold its 'Stag' beer, or any market adjacent thereto; (7) that the market in which plaintiff has advertised and sold its 'Stag' beer and the market in which defendant has advertised and sold its 'Stag' beer are wholly remote the one from the other, and plaintiff has no property rights in the trade-name of 'Stag' beer, or in markets adjacent thereto, and defendant has no property rights in the trademark 'Stag' in markets wherein plaintiff has advertised and sold its 'Stag' beer, or in markets adjacent thereto; * * * (9) that the use of the trade-

> mark 'Stag' or stag's head design, or any 'Stag' label by plaintiff, or the use of the trade-mark 'Stag' or stag's head design, or any 'Stag' label by defendant, has at no time caused any confusion in the trade or misled or caused any purchaser or induced anyone to buy any of the 'Stag' beer product of either of the parties as the product of the other." (Supra, at pp. 1021-2.)

As already pointed out, the case last cited involved the name of a product, while in the case at bar, there is involved only the question of the name used in connection with a place of business. In the very nature of things, the area of protection afforded to a trade-marked product will be wider than that given to the name of a business. The name of the product goes wherever the product is sold, by mail order or otherwise, regardless of where the business establishment is located, and the one first doing business in the territory is protected against the later comer. Conversely, the later comer is protected if he is first in the territory to use the name in question. (*Griesedieck Western Brewery Co. v. Peoples Brewing Co.,* supra at pp. 1022-3; *Sweet Sixteen Co. v. Sweet "16" Shop, Inc.* (CCA 8th) 15 F(2d) 920, 923 quoted and discussed to the same effect at App. Br. pp. 45-49.) In a case involving the name of an establishment, as distinguished from the name of a product, the principle is identical, but the area of protection will naturally be more circumscribed.

For example, plaintiff, National Grocery Co. had 400 grocery stores in the northern counties of New

Jersey, the word "National" was stressed in plaintiff's advertising. Defendant had 40 stores in the southern counties of the state, and conducted these under the name National Stores Corporation, likewise giving prominence to the word "National". The distance separating the nearest stores of the parties was 25 to 30 miles. An injunction was denied plaintiff, the court saying:

> "In all such cases, and in all of those cited by the complainant, there has been present the fraudulent element indicated by the language of Vice Chancellor Van Fleet which I have emphasized. In the case sub judice this necessary element to a case of unfair competition is not to be found. Obviously, by force of the definition of the kind of business in which the parties are engaged, each store must draw its trade from a very small surrounding territory, because customers obliged to pay cash and carry away their purchases will not patronize a store unless within their immediate neighborhood. The proofs show conclusively that not only has the defendant scrupulously remained out of the territory exploited by the complainant, but that the complainant's activities have been confined to the northern counties of the state, the defendant's to the southern or central part of the state, and that the most southerly of the former is separated by perhaps 25 or 30 miles from the most northerly of the latter. This being so, it can scarcely be said that any unfair competition exists. As tersely expressed in 37 Cyc. 760:
>
> > 'Of course, there must be actual competition before there can be any unfair competition.'

For example, it was held that druggists and physicians conduct businesses, professions, or callings not in competition with each other so that an injunction would not lie for unfair competition. Clark v. Freeman, 11 Beav. 112. To the same effect is Borworth v. Evening Post (37 Ch. D. 449), where it was held that an evening paper did not compete with a morning publication, each using in its title the word 'Post'.

The complainant goes further in its demands than I think is justified when it argues that because under its charter it is authorized to do business in any part of the state under its corporate name it has thereby pre-empted all the markets that can be found within New Jersey against any company formed with one adjective in its name to be also found in that of the complainant. Such a rule would be subversive of the underlying principle governing monopolies, and would, of course, be highly detrimental to the public interest by reason of the stagnation of trade while the complainant was making up his mind or securing the capital necessary to expand into territory it might properly occupy and which it hopes and expects some day to invade. While I know of no decision of our own courts in a case on all fours with the present case, there are, however, many opinions in other jurisdictions that make it clear that *the right of a given name previously adopted in a business located in one locality does not invest the proprietor of that business with the right to enjoin the use of the same or a similar name by a junior enterprise in another locality where one does not encroach upon the other.* Such were the cases of Eastern Outfit-

ting Co. v. Manheim, 59 Wash. 428, 110 Pac. 23, 35 L. R. A. (N.S.) 251; Investor Pub. Co. v. Dobinson (C. C.) 83 Fed. 56; Olin v. Bate, 98 Ill. 53, 38 Am. Rep. 78; Miskell v. Prokop, 58 Neb. 628, 79 N. W. 552; Hygeia Dist. Water Co. v. Consol. Ice Co., 144 Fed. 139; Nebr. Loan & Tr. Co. v. Nine, 27 Neb. 507, 43 N. W. 348, 20 Am. St. Rep. 686; Levy v. Waitt, 61 Fed. 1008, 10 C. C. A. 227, 25 L. R. A. 190; Hazelton Boiler Co. v. Hazelton Tripod Boiler Co., 142 Ill. 494, 30 N. E. 339; Bingham School v. Gray, 122 N. C. 699, 30 S. E. 304, 41 L. R. A. 243. But the complainant says this rule is not applicable to the instant case, because, in the very nature of things, the prospect of a so-called chain store business is the constant expanding, reaching out, and establishing of new stores in neighborhoods not already tapped. Surely, in the great majority of business enterprises, and especially those like the complainant's, involving a business capable of expansion and the investment of large capital, there is implied the hope, intention, and design of constantly invading new territory for the purpose of securing an increasing volume of business. *For reasons already touched upon, it would be absurd to say that any such intention should permit the pre-empting of the use of the name at a place and time where such a supposed business enterprise had no customers or business, and therefore nothing to lose. It is entirely too remote and fanciful for the complainant to object to another using a name in a certain locality, not because he has already established his trade there, but because he may do so in the future. For it is equally probable he may not.* It is significant that in all

the cases cited by the complainant in its brief there was an actual competition between the parties, in accordance with that portion of Vice-Chancellor Van Fleet's opinion in Van Horn v. Coogan, which I have already quoted and emphasized. In none of these cases is there presented the distinguishing features of this case, to-wit, that the parties were so separated from each other territorially that by reason of the fact and the character of their activities it was impossible for one to injure the other." (Italics added.)

National Grocery Co. v. National Stores Corporation (N. J. Ch.) 123 Atl. 740, 742-3.

Similarly, where a taxicab company commenced business in Los Angeles, using a name and slogan almost identical with that used by plaintiff in the same business in San Diego, plaintiff was denied an injunction, upon the ground that they were not operating in the same territory.

Yellow Cab Co. of San Diego v. Sachs, 191 Cal. 238, 242-244.

See also:

Eastern Outfitting Co. v. Manheim (Wash.) 110 Pac. 23, 35 L. R. A. (N. S.) 251.

The situation in the case at bar, involving the use of defendant's family name, is even stronger than in the cases cited, involving fanciful names. One has the right to such advantages as he feels are inherent in the use of his family name, in the absence of fraud or deception, and a family name cannot be made the subject of exclusive appropriation, even where there

is actual competition. It is his name, and was from birth, and he cannot be deprived of the right to use it, in the absence of fraud. On the other hand, one using a fanciful name has a free range of choice, and may thus avoid using a similar fanciful name which has become the subject of exclusive appropriation by another.

> "The right to do business under one's own name is one of the sacred rights known to the law; and a family name is incapable of exclusive appropriation and cannot be thus monopolized * * *. Every man has the absolute right to use his own name in his own business even though he may interfere with and injure the business of another bearing the same name; provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments or to produce injury to the other beyond that which results from the similarity of names."
>
> *Tomsky v. Clark,* 73 Cal. App. 412, 418.

See:

Ida May Co., Inc. v. Ensign, supra, at p. 344, Note: 47 A.L.R. 1190;

Alhambra Transfer etc. Co. v. Muse, 41 C. A. (2d) 92, 96.

The use of the name of some of its officers as part of its corporate name gives appellant no special rights.

Ida May Co. Inc. v. Ensign, supra, at p. 344.

The foregoing findings embrace all the issues necessary to determine the cause, and, in fact, embrace all the material issues raised by the pleadings:

"* * * if findings are made upon issues which determine a cause, other issues become immaterial, and a failure to find thereon does not constitute prejudicial error."

Peterson v. Murphy, 59 C. A. (2d) 528, 533.

It is therefore respectfully submitted that the findings amply support the judgment.

IV. REPLY TO APPELLANT'S ARGUMENT UNDER THE HEADING "THE FINDINGS FAIL TO REFLECT THE EVIDENCE ON MATERIAL POINTS AND ARE CLEARLY ERRONEOUS UPON OTHER MATTERS".

Under this catch-all heading (App. Br. p. 21) appellant, for the first time, gives some inkling as to the nature of its objections.

A. The first sub-heading is entitled:

"Appellant's stores are known and referred to as 'Lerner's'."

Under this heading it is stated that:

"* * * there is no reference whatsoever in the findings with respect to the very material issue and undisputed proof that the majority of appellant's patrons and prospective customers identify and designate appellant's stores as 'Lerner's'. (App. Br. p. 22.)"

Presumably this is urged as a ground for reversal. But on this subject the court made the following finding:

"* * * neither plaintiff nor any of its subsidiaries have engaged in the retail ladies ready-to-

> wear business in San Jose under the name of 'Lerner Shops' or under any other name including the word 'Lerner'. Defendant was first in the field in and about the City of San Jose in the retail ladies ready-to-wear business under a name including the word 'Lerner'."

Obviously, the foregoing finding disposes of any issue as to the name "Lerner" or any variant of the name, including "Lerner's". Under this finding it is immaterial that some customers in San Francisco, or elsewhere, *while doing business with or standing in front of a Lerner Shop,* referred to it as "Lerner's". This is all that the evidence showed. (Tr. pp. 190-194, 213, 225-228.) There was no evidence of any kind that "Lerner Shops" had in any manner, by advertising or otherwise, used the name in San Jose, as in the cases cited by appellant. On the contrary, there was evidence adduced by appellant which would justify the court in doubting the testimony that Lerner Shops were known as "Lerner's" even where the stores were located. (Tr. pp. 175-176.) But in any event, the court's finding that appellant never was in business in San Jose "under any name including the word 'Lerner' embraces every variation of the name, including 'Lerner's'." A specific finding such as is suggested by appellant would add nothing which is not already disposed of by the findings made.

> Furthermore, the court made detailed findings that "* * * no person of ordinary intelligence, and no person exercising ordinary care and no ordinarily observant purchaser would confuse it (appellee's store) with said 'Lerner Shops', or do business

with defendant under the reasonable or foreseeable misapprehension that he was doing business with said 'Lerner Shops'. * * * The style of lettering used by defendant on his store front and other advertising to display the name of his business * * * were so distinctive and different in every material respect from the arrangement and lettering, and the text thereof, used to display the name 'Lerner Shops' that no person of ordinary understanding and intelligence and no person exercising ordinary understanding and intelligence, and no person exercising ordinary care and no ordinarily observant purchaser would confuse defendant's store with said 'Lerner Shops' or do business with defendant under the reasonable or foreseeable misapprehension that he was doing business with 'Lerner Shops' or purchasing the merchandise of 'Lerner Shops'." (Finding VI, Tr. pp. 33-35.)

Of course, the foregoing findings are of the ultimate conclusion reached by the court as a result of all the evidence on the question of confusion, including the circumstance that persons standing on the street in front of a Lerner Shop, or while shopping in the store referred to a Lerner Shop as "Lerner's". Be that as it may, the findings of the court are to the effect that under all the evidence a person of ordinary intelligence will know that he is *not* doing business with a Lerner Shop when he is doing business with appellee's store in San Jose. The court obviously concluded that under the evidence in the case, it did not follow that because some persons, under some circumstances, referred to a Lerner Shop as "Lerner's",

that the converse is true, namely, that every person who saw the name "Lerner" or "Lerner's", as used by appellee, would of necessity believe it to be a "Lerner Shop". For example, if some persons referred to William Smith, a six-foot man, as "Smith", it would not follow that those same persons, confronted by Mary Smith, a five-foot woman must come to the conclusion that because both individuals had the name Smith in common, that Mary Smith would be mistaken for a six-foot man, by a person of ordinary intelligence. Obviously, there are other circumstances to be taken into consideration in determining whether there is a likelihood of confusion. The mere fact that appellant's stores were in some circumstances known as "Lerner's" is not conclusive of the question, as a matter of fact, and certainly not as a matter of law. The findings made, are of necessity contrary to the effect which appellant seems to ascribe to the circumstance in question. Consequently, the absence of a specific finding is not prejudicial.

> "* * * if the findings made necessarily negative the allegations * * * as to which specific findings are not made, the findings are sufficient."
>
> *Petersen v. Murphy,* 59 Cal. App. (2d) 528, 533-4.

Furthermore, it has been shown that even if a specific finding had been made on the detail mentioned, that it would not necessarily be inconsistent with and have the effect of counteracting the findings which were made. Consequently, there is no prejudice.

Petersen v. Murphy, supra, at p. 532.

B. Under the heading "Appellant had established a valuable reputation" appellant complains that:

> "* * * the findings, while adverting to the fact that appellant sells low or popular priced apparel, fail to reflect the evidence which established without dispute appellant's allegations that appellant has established a reputation for selling up-to-date, well styled apparel at prices below those of its competitors." (App. Br. pp. 22-23.)

It is to be assumed that this is also urged as a ground for reversal. It is difficult to see how appellant is prejudiced by the omission of such a specific finding, or how it could be aided by the inclusion thereof. Whatever the reputation of appellant, the court found that there was no fraud, confusion or unfair competition.

Furthermore, it was stipulated that appellant had a good reputation (Tr. pp. 216-217) and hence no specific finding is necessary on that point.

Boyd v. Liefer, 144 Cal. 336, 338.

In any event, the evidence did not go quite as far as appellant indicates. The testimony was merely that appellant undersold *some,* not *all,* of its competitors (Tr. pp. 65, 66, 201) and that there were some companies which undersold appellant. (Tr. p. 117.)

Nor did the allegations of the complaint to which appellant refers go as far as appellant suggests in this connection. The complaint merely alleges that appellant has established a reputation for selling such apparel "at very reasonable prices" (Tr. p. 3) and

for selling such "low priced" apparel. (Tr. p. 5.) In response to this allegation, and the testimony herein referred to, the court found that:

> "The business of said 'Lerner Shops' consists of the sale at retail, of low or popular priced ladies ready-to-wear wearing apparel." (Tr. pp. 31-32.)

Since this finding is substantially the same as the corresponding allegations of the complaint, appellant's objection is pointless.

C. Under the title "Appellant's stores had an established trade with persons from San Jose and adjacent cities, and many regular customers", appellant objects that:

> "* * * no finding was made with respect to appellant's claim and proof that prior to the time that appellant opened his store in San Jose * * * appellant's stores in San Francisco and Oakland had established a substantial nucleus of business with residents of San Jose and communities nearby. * * *" (App. Br. p. 23.)

This deals with the subject mentioned in appellant's title, but appellant continues the above quotation in an entirely new and irrelevant direction, saying:

> "and, on the basis of such business and as a part of appellant's plan, policy and practice of expanding from the populous cities in which it had first established its stores, into the smaller communities nearby appellant had leased additional locations in which to open new stores. * * *"

Turning back for the moment to the first part of this compound objection, it is patent on the face of it, that it draws conclusions not warranted by the evidence nor within the scope of the complaint.

Appellant refers to its "claim" that its San Francisco and Oakland stores "had established a substantial nucleus of business with residents of San Jose and communities nearby". Presumably by "claim" is meant the allegations of the complaint. The only allegation on this subject is that

> "Plaintiff's stores in San Francisco and Oakland include among their customers residents of the City of San Jose and other Santa Clara and San Mateo County communities". (Tr. p. 3.)

It will be noted that it is not alleged that the number of such customers is "substantial" or that appellant "had established a substantial nucleus of business" *in* that area. Doing business with people *from* another area is not the same as doing business *in* that area.

Finding III which is responsive to this allegation, reads:

> *"Said 'Lerner Shops' are without exception, situated in locations having the highest volume of pedestrian traffic, known as '100% locations', and rely in substantial part upon passing pedestrian traffic for their customers.* The business of said 'Lerner Shops' consists of the sale at retail, of low or popular priced ladies ready-to-wear wearing apparel. Said 'Lerner Shops' do not advertise in newspapers, periodicals, or in any other manner than in the use of the name 'Lerner

> Shops' on the store fronts of the several stores, and the use of such name on paper and bag containers and price tickets attached to merchandise displayed in the show windows of said stores. No variation or abbrieviation of the name 'Lerner Shops' is used in such advertising. *The customers of said 'Lerner Shops' consist in substantial part of persons who comprise the pedestrian traffic passing the respective stores, consisting in each instance, principally of persons from within the city and its immediate environs where a 'Lerner Shop' is situated, but including some persons from other areas throughout the United States and other places.*" (Tr. pp. 31-32; italics added.)

The last sentence of the finding clearly embraces the allegations of the complaint above quoted. Consequently, appellant has no occasion to object upon the ground that this allegation of the complaint was neglected by the court.

Appellant objects that "this finding is misleading and contrary to the evidence in several respects". (App. Br. p. 23.) Appellant can not object that the finding is not in accordance with the evidence. While it is true that there was evidence that appellant's customers included residents of San Jose and vicinity, there was at the same time evidence that appellant's customers also included persons from everywhere in the United States and other places, exactly as set forth in the findings, thus:

> "Q. Now, Mr. Magee, your San Francisco Stores [sic] does business with people from New York?
>
> A. Yes, sir.

Q. It does business with people from South Dakota?

A. I assume so.

Q. And it does business with people from every geographic point I might mention inside and outside of the United States, and that at times you have taken care of people from Timbuktu?

A. That's right.

Q. That is why you are in 100 per cent locations, because those are the crossroads of the world?

A. They come from Canada and Cuba." (Tr. p. 139.)

It will be observed that while the complaint merely alleged that appellant had customers from San Jose and other Santa Clara and San Mateo County communities, the evidence was not limited to these areas, and the findings are strictly in accordance with the evidence, and embrace the matter alleged in the complaint. It is appellant who desires to have the finding in such form as to be "misleading and contrary to the evidence", by ignoring the wider scope of the evidence. In view of the character of appellant's objections to the findings, there is no doubt that if the findings were limited to the territory mentioned in the complaint, appellant would object that the findings were too limited because they ignored the evidence above quoted. As a matter of fact, appellant does also make precisely that objection. Appellant's next objection is that the finding:

"In the first place, overlooks the material evidence that appellant is patronized regularly by

> persons who trade with its stores in the various cities of the country *where such persons happen to be.*" (App. Br. p. 23; italics added.)

Obviously, the finding does exactly what appellant just previously says that it does not do. It specifically sets forth that appellant's stores are patronized by persons in the various cities of the country "where such persons happen to be", to use appellant's own phraseology.

Appellant's next objection is that:

> "* * * the evidence also showed that many of the customers of appellant's stores in San Francisco and Oakland patronize such stores repeatedly." (App. Br. pp. 23-24.)

No doubt the objection is meant to imply a specific finding should have been made to the effect that many of appellant's customers patronize the stores more than once, and in the absence of such a finding the judgment should be reversed. Unfortunately, appellant neglects to point out how such a finding would alter the judgment.

Continuing its objections to Finding III, appellant says:

> "In the second place, this finding is incomplete and misleading in its reference, in a rather offhanded manner, to the fact that appellant's patrons do include some persons from places other than the cities where appellant's stores are located. The facts affirmatively establish, without dispute, that a substantial number of customers of appellant's stores in San Francisco and Oak-

land are from cities all up and down the San Francisco peninsula, including San Jose." (App. Br. p. 24.)

As already pointed out, the finding that appellant's patrons come from many places is directly taken from the testimony, hence it cannot be "incomplete or misleading". But the assertion that "The facts affirmatively establish *without dispute* that a *substantial* number of customers of appellant's stores in San Francisco and Oakland are from cities all up and down the San Francisco peninsula, including San Jose" is directly contrary to the fact. Mr. Magee, the vice president of appellant corporation (Tr. p. 62) testified, on cross-examination:

"Q. Do you maintain, Mr. Magee, that people come from San Jose to San Francisco for the express purpose of shopping at Lerner's Shops?

A. I would say some customers do.

Q. You wouldn't know how many or what percentage?

A. I wouldn't know how many." (Tr. p. 139.)

Certainly that testimony does not support appellant's assertion. Again Mr. Magee testified, on cross-examination:

"Q. Do you consider Sacramento in the trade area of San Francisco?

A. I would say people in Sacramento trade in San Francisco.

Q. Your Market Street store does considerable business with people from Sacramento?

A. I wouldn't say 'considerable business'. They do *some* business.

Q. You would say they do considerable business in San Jose?

A. They do business.

Q. Would you say it was considerable?

A. *I wouldn't say.*" (Tr. p. 173.)

Likewise, this testimony is directly contrary to appellant's bold assertion. It should be pointed out here that appellant neglected to quote or refer to this portion of Mr. Magee's testimony in the statement of the evidence, but referred only to his equivocal testimony on direct examination (App. Br. p. 11) as follows:

> "Q. At that time when you started those negotiations, did you determine whether or not you had a nucleus in San Jose?
>
> A. Yes, we had been in business on Market Street in our large store since 1935, and we had built up a very substantial volume. The records that we would have there in the form of credit slips would indicate we had a great many customers in San Jose, and also other surrounding communities of San Francisco." (Tr. p. 79.)

It will be observed that Mr. Magee was merely giving his conclusion that appellant had a "great many" customers in San Jose, *and other surrounding communities of San Francisco,* and that he based that conclusion upon certain records which are referred to in appellant's statement of evidence, immediately following the reference to the foregoing testimony. (App. Br. p. 11.) It should be noted that Mr. Magee takes in "other surrounding communities of San Francisco" in his statement that "we had a great many customers". There is no clue as to what he meant by "a

great many" or how many of the customers came from communities north and east of San Francisco, and how many from communities south of San Francisco, or what communities he considered as "surrounding" San Francisco. This testimony does not support appellant's assertion that a *"substantial* number of customers * * * are from cities all up and down the peninsula, including San Jose." Mr. Magee's conclusion is naturally no better than the information upon which he based it. It was obviously for the trial court to determine whether the number of customers from "all up and down the peninsula" was "substantial" and even if the number in that extensive area was substantial, whether of that number, the number coming from in and around San Jose was *"substantial"*. In any event, the circumstance that plaintiff did business with some people from San Jose, is not the same thing as doing business *in* San Jose. If that were not so, then the fact that appellant had a store in San Francisco would give it prior rights throughout the United States and in Timbuktu, Canada and Cuba, because, as Mr. Magee testified the San Francisco store does business with people from those places, as well as with people from San Jose. (Tr. p. 139.)

Be that as it may, the trial court was undoubtedly impressed by Mr. Magee's later testimony, on cross-examination, to the effect that the business done with people from San Jose was *not* "considerable." (Tr. p. 173.) The trial court also was warranted in reaching a conclusion, from the records introduced, at variance with that of appellant, and the equivocal and con-

tradicted conclusion of Mr. Magee. For example, these records showed that in an eight month period, appellant's Market Street store had thirteen exchange transactions with persons from San Jose; and that such transactions represent 6 to 7 per cent of total transactions. Converting these figures into an annual basis, it appears that in a period of one year, the Market Street store had 324 transactions with residents of San Jose (App. Br. p. 12) or 27 transactions per month, or a so-called "substantial nucleus of business with residents of San Jose" of about one (1) transaction per day. In this connection, Mr. Magee testified on cross-examination that he did not know how many of those customers came to San Francisco from San Jose for the express purpose of shopping at Lerner Shops. (Tr. p. 139.) The trial court properly concluded and stated, that a finding such as that insisted upon by appellant would be contrary to the evidence. (Tr. pp. 319, 337.)

The court also stated its position in this connection on motion for new trial:

> "The Court. Let me say this to you, so that if you can clear up my mind you will have a chance to do so, but I felt from the evidence that there was not any substance whatsoever to that contention in the facts of the case. *It may be that the record shows there were some customers, but I felt in truth and in fact that was not a substantial matter.* The argument that good will attaches itself over all areas that might resonably be the basis of affecting the property right of good will would be negatived by the fact that over a period

of time a certain area is left untouched by the plaintiff company because they did not attach enough substance to the business that might be developed in that area, and hence they leave it alone. Now, you have a factual situation there. It seems to me from the evidence that there was not any substance to it, at all, that there was not any business or good will that was attached to what the plaintiff's store in San Francisco would get out of this particular area down in San Jose, and therefore there was not any effect upon, or substantial effect upon the plaintiff's property right, even assuming that the acts of the defendant were violative of that property right." (Tr. p. 338.) (Italics added.)

In view of the foregoing it is hardly necessary to point out that appellant's contention that the facts under discussion are "uncontradicted" or "without dispute" is, if not reckless, at least careless. Consequently, appellant's objection that no finding was made that "appellant's stores in San Francisco and Oakland had established a substantial nucleus of business with residents of San Jose and communities nearby" is without merit.

From the foregoing, it follows that the second portion of the same objection, based upon the erroneous assumption that the court must necessarily have found that appellant had a substantial nucleus of business in San Jose, must inevitably fail. That objection is that the court also failed to find that:

"* * * on the basis of such business and as a part of appellant's plan, policy and practice of

expanding from the populous cities in which it had first established its stores, into the smaller communities nearby appellant had leased additional locations in which to open new stores in San Jose, Palo Alto, San Mateo and Burlingame." (App. Br. p. 23.)

Breaking down the finding which it is insisted the trial court should have made, it is observed that it is demanded that the trial court should have found:

1. Appellant had a substantial nucleus of business with people from San Jose and communities nearby.

2. On the basis of such business, appellant had leased stores in San Jose, Palo Alto, San Mateo and Burlingame.

3. Appellant had leased such stores as a part of appellant's plan, policy and practice of expanding from the populous cities in which it first established stores into the smaller communities nearby.

Since it has been demonstrated that a finding that appellant had "a substantial nucleus of business" would have been contrary to the evidence, it follows that a finding that appellant leased such stores on the basis of such business would be likewise without foundation of fact. The court did find that appellant had leased a store in San Jose with the intention of opening a store (Finding IV, Tr. p. 32), and this finding is directly responsive to the corresponding allegations of the complaint. (Comp. Par. 3, Tr. pp. 3-4.) The complaint did not contain any allegations to the effect

that such leasing was based upon any "nucleus of business," or in pursuance of any "plan, policy and practice of expanding" from populous cities into smaller communities. Consequently, appellant is in no position to complain that findings were not made upon issues which were not raised by the pleadings.

> "The rule is that findings should be confined to the facts in issue, the province of the court being to determine but not to raise issues."
>
> *Rich v. Moss Beach Realty Co.,* 43 Cal. App. 742, 744.

However, even if it be assumed that the pleadings did raise an issue as to whether appellant made the lease in San Jose upon the basis of the "nucleus of business," or pursuant to a plan or policy of expansion from large cities to small communities, the evidence would not support such findings.

As already pointed out, there was no "substantial nucleus of business *with* residents of San Jose" and certainly no business whatever *in* San Jose. Consequently, the lease in San Jose could not have been taken for that reason. Obviously, it was taken for the same reason that appellee took his lease, namely, a desire to enter into business *in* San Jose, to get business not otherwise obtainable (Tr. p. 137) independently of any so-called "nucleus."

Similarly, the evidence does not support the contention that appellant made its lease in San Jose pursuant to a plan of expansion from large cities to smaller communities. While Mr. Magee testified that

his company did have such a policy (Tr. pp. 76, 137) the example he gave, of the appellant's practice in California, did not support his testimony. He testified as follows:

> "Q. What determines the place where the company will open new stores?
>
> A. Using San Francisco as an illustration, we first opened in San Francisco to establish business here, and eventually opened in the surrounding areas to San Francisco. We did likewise in Los Angeles, and that is true of the other large cities." (Tr. pp. 75-76.)

Mr. Magee's testimony was directly contrary to the facts, as demonstrated in the schedule of appellant's store openings set forth at page 8 of appellant's brief. The first store opened in California was in 1930, in what appellant would undoubtedly define as an outlying community, namely, Pasadena. In the same year stores were also opened in Santa Barbara, San Diego, San Bernardino and Los Angeles. Obviously, these stores do not support the assertion that there was a "practice of expanding from the populous cities in which it had first established its stores into the smaller communities nearby." Since all the stores were opened in the same year, it is quite plain that there was no "nucleus" and no plan of expansion. The stores were patently opened in each place for the plain and simple reason that appellant desired to do business *in* each place, regardless of "nucleus" or "expansion." This is further borne out by the fact that the only other store opened in Southern Cali-

fornia between 1930 and 1942, a period of twelve years, was in Long Beach, in 1931. Since this date is so close to the opening of the other stores, it lends no support to any argument based upon "nucleus of business" or "policy of expansion", but rather indicates that all the Southern California stores, including Long Beach, were opened at approximately the same time and for the same reason, reluctantly admitted by Mr. Magee: to do business in each community through a store in that community, regardless of the proximity of other stores of appellant. (Tr. pp. 137-138.) Certainly the practice in Southern California does not bear out any high-flown theories of "nucleus of business" and "policy of expansion" into smaller communities.

Turning to Northern California, we find that appellant took a lease in Sacramento in 1929, with the intention of opening a store. Appellant changed its corporate mind in 1932, and "bought itself off the lease." (Tr. pp. 132-3.) This was not an isolated instance, as Mr. Magee admitted that there were other instances where leases had been taken, and no store opened, but he did not give them all, because, he said: "That would take too much of the court's time to do it." (Tr. pp. 133-4.)

Mr. Magee admitted a similar incident with regard to San Jose, the very same city involved in the instant case. Appellant took a lease there in 1931 or 1932 and subsequently gave it up. The following testimony by Mr. Magee, on cross-examination, reveals the real nature of appellant's "plan, policy and practice."

"Q. Mr. Magee, you stated in response to Mr. Goldberg's question that those leases that you bought your way out of in 1932 and thereabouts was on account of the depression?

A. That's right.

Q. By that you meant to say it was not profitable for you to continue to keep those leases?

A. We weren't ready at that time to expand our business, and open new stores.

Q. In other words, the simple fact is you decided it wasn't profitable for you to keep the leases or to open stores where you did have leases?

A. The answer is, it was not profitable, or it was not propitious at that time to open new stores.

Q. So you decided to get out until it was?

A. We decided where we could buy ourselves out of leases to do so, and then at a later time open stores in those communities.

Q. *And your object in going in any place is to go in if you think it is going to be profitable, and stay out if it isn't going to be profitable?*

A. *That is true.*

Q. You mean to say you go into a community if you think it is going to be profitable?

A. We go into a community if we thought it was going to be profitable.

Q. And if you go into a communtiy where you thought it was going to be profitable, and if after passage of time you find it is not going to be profitable, you get out?

A. We never assumed at any time it wouldn't be profitable to have a store in San Jose. We believed it wasn't propitious to have one there, to retain the lease." (Tr. pp. 152-3; italics added.)

It should be observed that while Mr. Magee testified that "we weren't ready at that time to expand our business and open new stores," he could not have been referring to the policy of "expansion from large cities to small communities" urged by appellant, because Sacramento and San Jose are obviously small communities, compared to San Francisco and Oakland. But appellant had no stores in either of these latter cities until 1934! (App. Br. p. 8.) Consequently, Mr. Magee could not have been talking about expanding from a large city to a smaller community to take advantage of a "nucleus of business" which did not exist. Since the leases in Sacramento and San Jose were taken and given up before appellant had a store in either Oakland or San Francisco, the testimony hardly supports the existence of a plan of expansion from large cities to small communities.

It is noteworthy that the first two stores actually opened in Northern California were in Oakland and San Francisco, in the same year, 1934. This also does not give support to the existence of a plan of expansion. Similarly, the third store in Northern California was opened the following year, on Market Street in San Francisco. Surely, the opening of a second store in San Francisco, a few blocks from the Grant Avenue store, gives no support to the "nucleus of business" contention or to the existence of a "plan of expansion" from large cities to smaller communities. Market Street is not a "smaller community nearby" Grant Avenue. It is obvious that as was the

case in Southern California, appellant opened a group of stores in one general area at about the same time for the purpose of doing business in the respective areas, and that there is no evidence of a "policy of expansion" from larger to smaller communities. The evidence is to the contrary.

For example, the next store opened in Northern California was in Stockton, in 1940. If the "nucleus of business" theory was a fact, the next store should have been in San Mateo, San Rafael, Hayward or any other of the "smaller communities nearby" San Francisco and Oakland, because obviously a store in either of these cities would do more business with people from closer communities. Again refuting appellant's contention is the circumstance that the next store opened after Stockton outside the Los Angeles area was in Bakersfield, in 1943. The burden would appear to be upon appellant to point out how the opening of the store in Bakersfield illustrates a plan of expansion from the larger cities to smaller nearby communities, particularly in view of the circumstance that in the meantime no stores were opened in communities near to San Francisco. The same observation applies to the opening of the Fresno store in 1944, after the commencement of this action. (Tr. p. 122.)

There is no doubt that the facts do not support the contention of appellant. A finding such as that urged would not be supported by the evidence and is not within the issues. The attitude of the trial court on the subject is indicated by the following:

"Mr. Goldberg. I would like to say this: We are not relying on any unannounced or secret intention and we are not relying exclusively by any means on the fact that we had negotiated a lease which was in existence when the defendant opened his business; but we do rely on the general course of conduct in the operation of its business, that it is an expanding business, that it already had thirteen stores in California and was actually negotiating and had negotiated leases for many other purposes; that it was part of its practice to expand into areas like San Jose.

The Court. The record will show whatever the policy of the company is in that respect. I will say for the benefit of counsel for the defendant in that regard that I can't see anything to that point, at all." (Tr. pp. 168-9.)

It is respectfully submitted that the conclusion of the trial court is wholly appropriate and correct. It is therefore unnecessary to discuss what would be the effect on this case if the evidence showed a "policy of expansion." Unfortunately, for appellant, even if the evidence supported its contention, it would not follow that appellant would have a pre-emptive right to invade communities surrounding big cities whenever it suited their pleasure, and that others must keep out in the meantime. The authorities are to the contrary.

Griesedieck Western Brewery Co. v. Peoples Brewing Co. (C.C.A. 8th) 149 F (2d) 1019, 1022;

Yellow Cab Co. of San Diego v. Sachs, 191 Cal. 238, 243-4;

Eastern Outfitting Co. v. Manheim (Wash.) 110 Pac. 23;

National Grocery Co. v. National Stores Corp. (N. J. Ch.) 123 Atl. 740, 742-3.

It is not necessary to discuss the authorities cited by appellant to support its opposing contention. It is sufficient to point out that in every instance where relief was granted, there was evidence either of fraudulent intent or that the aggrieved party had first done business in the territory in question, by mail order, travelling salesmen or otherwise.

E. Appellant complains next that:

> "The findings fail to reflect in any manner the material evidence showing that appellee had never done business as 'Lerner's' prior to the time that he opened his store in San Jose, that he had never engaged in the retail business anywhere, nor in any business located in San Jose." (App. Br. p. 24.)

It may be assumed that what appellant means to indicate is that there should have been a specific finding on each of the above points, and that the absence thereof is prejudicial and reversible error.

In view of the findings already discussed, to the effect that appellee was first in the field in the retail ladies ready-to-wear business in San Jose under a name including the word "Lerner's" it is difficult to see how plaintiff can be prejudiced by the absence of a finding that appellee had never before done business as "Lerner's" even if it be assumed, contrary to the

evidence, that such a finding were justified. (See Tr. pp. 267-269.) However, the answer admits when appellee commenced doing retail business in San Jose (Tr. p. 24), and the court found in considerable detail when and how he commenced doing business in San Jose. (Findings IV and V, Tr. pp. 32-33.) Consequently, the objection is not only without legal merit; it is contrary to the record.

The next grievance, that the findings do not show that appellee never engaged in the retail business anywhere, is wholly irrelevant. No matter which way the fact might be, the rights of the parties in the premises would not be altered in any degree by a finding one way or another, and appellant has not undertaken to show how the absence of such a finding is prejudicial.

The same is true of the objection that there is no finding that appellee had not previously engaged in any business in San Jose. It is impossible to see what effect this has on the judgment, and appellant has offered no assistance in that regard. The trial court did find when appellee did commence business in San Jose, and that such commencement preceded the entry of appellant into the field. That is all that is material in supporting the judgment.

F. Continuing to examine appellant's objections to the judgment in this case, it is next objected that the court found "that appellee took reasonable precautions to prevent confusion between his business and that of appellant. (Tr. p. 33, Finding V.) The evi-

dence clearly shows directly to the contrary." (App. Br. p. 24.) Appellant has not in the brief favored this court or appellee with all the evidence on this subject. There was a great deal of detailed evidence on the subject of the appearance and construction of the respective stores. (Tr. pp. 86, 92, 103, 120, 130-135, 138, 149-152, 153-160, 178-180, 230-233.) Similarly, there was much evidence on the form of newspaper and other advertising used by appellee in San Jose. (Tr. pp. 12-15, 234-262.) Appellant does not advertise in newspapers, periodicals, or in any other manner than in the use of the name "Lerner Shops" on the store fronts of the several stores, and the use of such name on paper and bag containers and price tickets attached to merchandise displayed in the show windows of the respective stores. (Finding III, Tr p. 32.)

Upon the basis of all this evidence, the court made the finding objected to, that appellee took reasonable precautions to avoid confusion. Obviously, the court drew conclusions from the evidence diametrically opposed to the conclusions drawn by appellant, and so stated in the course of the proceedings. (Tr. pp. 293-294.)

Also entering into the court's conclusion are the circumstances as to the distance between the stores of the respective parties and area and population to which they catered, respectively. (Tr. pp. 51-52, 296.)

In reaching a conclusion as to the likelihood of confusion between the stores of the parties located in separate cities, as in this case, the court was

undoubtedly aided by the circumstance that appellant and another chain of stores in the same line of business, also having the word "Lerner" in the name, are apparently doing business without confusion or damage to each other in cities located at distances similar to the distance between San Jose and San Francisco, and which Mr. Magee admitted were in what he considered the same "trading area." In fact, Mr. Magee did not even know whether appellant or the competing chain was the first to open stores in the respective so-called "trading areas". Thus, it is apparent that appellant may have done exactly what it objects to here, and without confusion or damage to any one, by opening stores in analogous circumstances where a competing chain using the word "Lerner" in its name was already in business. (Tr. pp. 170-173.) For example, a wholly unrelated chain organization doing business under the name of Lerner-Vogue, or J. S. Lerner-Vogue, has four stores in Kansas City. Appellant, or one of its subsidiaries has a store at Topeka and another at Wichita, Kansas. The court was entitled to take judicial notice that Topeka is about 68 miles from Kansas City, although Mr. Magee, who testified about appellant's "expansion policy" into surrounding communities testified he did not know the distance. Mr. Magee did know that Wichita was about 100 miles from Kansas City. Yet Mr. Magee, did not discover that the competing firm was in business until about ten years after it commenced to do business! (Tr. pp. 141-144, 170-175.) Certainly this was evidence that confusion was not inevitable between

stores located as in the case at bar, and using the word "Lerner" as part of the name.

It is patent that appellant's real objection is, not that the findings of the court in this respect are contrary to or unsupported by the evidence, but that they are contrary to appellant's view of the evidence.

G. Appellant also complains that:

> "There is no finding * * * bearing directly upon appellee's original intention in designating his store as 'Lerner's'." (App. Br. p. 25.)

No comment is required here except to refer to Findings V and VI "bearing directly" on appellee's good faith and conduct in the premises. The evidence in support of this finding is found in appellee's testimony that since 1938 or 1939 he had had the intention of opening a store there under his own name and had negotiated for a location there from time to time until he acquired the lease of his present premises. He had resided on the Peninsula for about nine years and had become widely acquainted in and about San Jose, and counted on his acquaintanceship to assist his business. There was no evidence that appellee knew of appellant's intention to open a store in the area. (Tr. pp. 266-274.) This evidence amply supports the court's findings of appellee's good faith.

H. The objection entitled:

> "The finding that appellee's newspaper advertising showed the differences between the two businesses, is squarely contrary to the evidence" (App. Br. p. 25),

is so clearly a question of fact for determination by the trial Court that the mere statement of the objection answers itself. There was a great deal of evidence on the subject of the differences in the type and quality of merchandise and price ranges of the respective businesses, and of the character of the newspaper advertising of these matters by the appellee disclosing these differences. (Tr. pp. 12-15, 162, 199-205, 234-264-266, 272-282.) Obviously, appellant is really contending that the conclusion of the court is contrary to its view of the evidence, rather than that the evidence is "squarely contrary" to the findings. Proof of this is found in the fact that in support of this argument appellant states that:

> "* * * such advertisements solicited the purchase of the same items of merchandise as are sold in appellant's stores, and show such items at prices which are in the same range as those of appellant." (App. Br. pp. 26.)

Even if this were the effect of the evidence it is difficult to see how appellant is damaged thereby. If appellee advertises in a San Jose paper, a fur trimmed coat, for example, for sale in San Jose, at a price which is within the *price range* of appellant's coats on sale in San Francisco, it does not follow that anyone reading the advertisement in San Jose must necessarily conclude that appellant is the owner of the store. The evidence showed that appellant sold fur trimmed coats in a price range from $24.95 to $79.00 (Tr. p. 185) while appellee's price range for fur trimmed coats was $49.95 to $110.00. (Tr. pp.

256-257.) Now, if appellee advertised a fur trimmed coat for say, $75.00, it is ridiculous to argue that such advertisement of necessity must lead a resident of San Jose to believe that appellee's store belongs to appellant. It was clearly a matter for the trial court to determine what, if any, effect such evidence had in the ultimate question of whether there was confusion or unfair competition. The mere failure of the court to agree with appellant's views does not make its conclusions "squarely contrary to the evidence".

I. Appellant objects that the finding that appellee's store is of different character and appearance from appellant's stores, so as to make confusion improbable, is unsupported by evidence, and that the record is "directly to the contrary" of the finding. (App. Br. p. 27.)

Appellant says that "appellee's store is similar in size to appellant's stores on Grant Avenue in San Francisco and in Oakland." We are not referred to any evidence showing what is meant by "similarity in size". Whatever it may mean, it certainly does not support the contention that the finding of sufficient dissimilarity is contrary to the evidence. The mere similarity of the size of stores does not conclusively establish that confusion must follow.

The same is true of the argument that "appellee's designation of his store as Lerner's, on his billboard type of sign, and on his show-windows, boxes and bags, *while not identical with the designation used by appellant in such instances,* nevertheless consists

almost entirely of the name 'Lerner' * * *'' (App. Br. p. 27.) (Italics added.)

It was obviously a matter of fact for the trial court to determine whether the "not identical" designation was sufficiently "not identical" to avoid confusion. In any event evidence of the use of the word "Lerner" in an admittedly "not identical" manner is certainly not evidence "directly to the contrary" of the finding.

Another point of similarity which, appellant urges, is contrary to the finding is that "the same articles of merchandise as appellee sells are sold by appellant and the price ranges of the parties overlap". (App. Br. p. 27.) This point has been dealt with above. Suffice to say here that this fact is not inconsistent with the finding in question.

Clearly, the fact that there was a general similarity of size of stores, a "not-identical" use of the word "Lerner" and sale of the same kind of merchandise in overlapping price ranges, does not support the contention that appellee's store was not so different that no person exercising ordinary care would be confused.

J. Appellant complains that the finding that there had been no confusion between the businesses of the parties was contrary to the evidence. (App. Br. p. 28.) There was no direct evidence that any person had dealt with appellee, believing that he was dealing with one of appellant's stores. The evidence was

all by employees of appellant, at second or third hand. (Tr. pp. 95, 196-197, 214, 228.)

However, even if the testimony had been given by the customers themselves, it would not have been conclusive upon the trial court. It was for the trial court to give it such weight as it deserved and to determine if the confusion was reasonable, or the result of carelessness and inattention.

American Automobile Ass'n. v. American Automobile Owners Ass'n., 216 Cal. 125, 131-142.

Naturally, if the court is not conclusively bound by such testimony when given by the persons who were mistaken, the rule is applicable, *a fortiori,* where the statement of such persons are related in court by third persons, as hearsay. It must be remembered that appellant is not objecting that such evidence was excluded, but only that the court did not give it sufficient weight. This is not reviewable on appeal.

American Automobile Ass'n. v. American Automobile Owners Ass'n., supra, at p. 141.

CONCLUSION.

It is respectfully submitted that appellant's specifications of errors presents no reviewable question; and that appellant's objections to the various findings are in the main that the trial court did not draw the same conclusions and inferences from the evidence as appellant, appellant's view not being the only one possible under the circumstances.

The findings are in proper form. They dispose of all material issues and support the judgment. It is respectfully submitted that the judgment should be affirmed.

Dated, San Francisco, California,
April 7, 1947.

Respectfully submitted,
MARCEL E. CERF, ROBINSON & LELAND,
By HENRY ROBINSON,
Attorneys for Appellee.